Agenda Date: 6/21/06
Agenda Item: 4A

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

DIVISION OF
TELECOMMUNICATIONS

IN THE MATTER OF THE PETITION OF VERIZON NEW JERSEY INC. FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS IN NEW JERSEY PURSUANT TO SECTION 252 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, THE TRIENNIAL REVIEW ORDER AND THE TRIENNIAL REMAND ORDER	)	ORDER ON RECONSIDERATION DOCKET NO. TO05050418
IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS D/B/A COVAD COMMUNICATIONS COMPANY, SNIP LINK LLC, XO COMMUNICATIONS SERVICES, INC. AND XTEL COMMUNICATIONS, INC. FOR AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH VERIZON NEW JERSEY INC., PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, THE TRIENNIAL REVIEW ORDER AND THE TRIENNIAL REMAND ORDER	)	DOCKET NO. TO05070606
IN THE MATTER OF THE PETITION OF XO COMMUNICATIONS SERVICES, INC. FOR ARBITRATION OF AN AMENDMENT TO AN INTERCONNECTION AGREEMENT WITH VERIZON NEW JERSEY INC.	)	DOCKET NO. TO05060551
IN THE MATTER OF THE PETITION OF ATX LICENSING, INC.; CTC COMMUNICATIONS CORP.; ICG TELECOM GROUP, INC.; AND LIGHTSHIP TELECOM LLC FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH VERIZON NEW JERSEY INC. PURSUANT TO SECTIONS 251, 252 AND 271 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE TRIENNIAL REVIEW ORDER AND TRIENNIAL REVIEW REMAND ORDER	)	DOCKET NO. TO05060552

(SERVICE LIST ATTACHED)

BY THE BOARD:

On May 12, 2006, XO Communications Services, Inc., ("XO") filed a motion for reconsideration with the New Jersey Board of Public Utilities ("Board"), seeking modification of the Board's April 27, 2006 Order that finalized the language of a number of arbitrated interconnection agreement between XO and other competitive local exchange carriers ("CLECs") and Verizon New Jersey Inc. ("VNJ"). Specifically, XO calls upon the Board to (1) exclude from the amendment contract language that permits VNJ to retroactively re-price network elements and facilities requested by XO if VNJ prevails in a dispute concerning self-certification; and (2) adopt express language requiring VNJ to continue to provision Discontinued Facilities at all wire centers and route locations where XO self-certifies that the elements and facilities remain available under Section 251(c)(3). Within a timely manner, VNJ filed its opposition to this motion, claiming that XO failed to satisfy the technical requirements of the application and failed to assert any errors of fact or law such that reconsideration should be entertained.

XO, in its motion, calls upon the Board to make two major changes to the interconnection agreements. First, XO claims that its proposed language should be substituted for that in the current agreement as to charges following a dispute over self-certification and Section 251(c)(3) UNEs. The language currently in the agreement, according to XO, allows VNJ to effectively impose a penalty upon New Jersey CLECs that use the unbundling rights authorized by the FCC by allowing a month-to-month rate, rather than a term or volume rate. Furthermore, as the language conceivably allows for late charges and other fees, according to XO, this language provides VNJ with an incentive to delay bringing disputes to the Board in a timely manner. Thus, XO calls upon the Board to modify this language, in keeping with the decisions of Massachusetts, California, and New York.

Second, XO claims that the Board should adopt XO's language requiring VNJ to continue to provide discontinued facilities at all wire centers where XO self-certifies, subject to FCC requirements and the Triennial Review Remand Order ("TRRO"). XO claims that VNJ has recently asserted that it may re-price elements even where XO has self-certified, and thus the proposed language is necessary to ensure appropriate action by VNJ. Therefore, XO calls upon the Board to modify the language in the interconnection agreements.

VNJ, in its reply, asserts that XO failed to satisfy the requirements of N.J.A.C. 14:1-8.6, by filing to state, in separately numbered paragraphs, the alleged errors of law or fact relied upon, such that the motion is incomplete. VNJ claims that XO, in asking for a change in language as to the pricing of Section 251(c)(3) UNEs following a dispute over self-certification, fails to assert any error in fact or law; instead, XO is simply asking for a modification to the language to relieve itself of its burden in the self-certification process. VNJ asserts that, under XO's proposed language, the CLEC would have an incentive to make false or incorrect self-certifications, and that it is impractical or impossible to determine the correct rate that might have applied to the CLEC if it had correctly ordered its special access instead of the UNE. The current language, notes VNJ, accurately reflects that the CLEC has received a month-to-month special access facility at UNE rates, and that this rate should be rectified to make both VNJ and the CLEC whole in the event the CLEC did not qualify for the UNE rate. VNJ claims that Massachusetts did not accept the XO language but instead approved language that authorizes negotiations between Verizon and the CLEC on a going-forward basis, and that New York likewise did not approve what XO here proposes. Finally, VNJ states that it would not have any incentive to

delay action at the Board when a CLEC is receiving inappropriate UNE rates, and is in the process of drafting a petition as this matter moves forward. Thus, VNJ calls upon the Board to deny this motion.

As to the issue of the language requiring VNJ to continue to provide discontinued facilities at all wire centers where XO self-certifies, VNJ notes that XO has raised this issue for the first time here in its reconsideration application, and thus it is untimely. Furthermore, VNJ claims that XO's interpretation of the TRRO to require a certification and dispute process on both new orders and upon embedded base of high-capacity loops and transports is frivolous and wrong as a matter of law. The language in the TRRO, claims VNJ, applies only to new UNE orders, and no expectation exists for this process to be ported to the existing facility base. Finally, XO had the opportunity to present this theory before and failed to do so; according to VNJ, this is simply an attempt by XO to attempt to modify provisions of the interconnection agreement and the TRRO that are outside the scope of this action. As such, VNJ calls upon the Board to fully deny this motion for reconsideration.

Following review, and in light of the nature of the motion, the Board finds that nothing in XO's motion requires the Board to modify or otherwise reconsider its decision. A party should not seek reconsideration merely because they are in some way dissatisfied with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. At 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In much the same manner, this Board will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. Here, the Board does not find that the issues raised by XO are sufficient to warrant reconsideration or modification. XO's allegations of error are, essentially, reiterations of the arguments presented below which the Board rejected or else introductions of new arguments. Nothing in the arguments presented now rises to the level to convince the Board that the language approved for the interconnection agreement is fatally flawed or wrong. Policy considerations on the issue of the burden of self-certification, and

interpretation of elements of the TRRO, both fall within the Board's jurisdiction, and nothing in XO's petition reveals a foundation to believe that the Board misapplied fact or law. As such, the Board HEREBY FINDS that the errors alleged by XO do not rise to the level to require reconsideration or other modification of the Board's April 27, 2006 Order, and thus the Board HEREBY ORDERS that the motion for reconsideration by XO is DENIED.

DATED: 6/22/06

BOARD OF PUBLIC UTILITIES
BY:

JEANNE M. FOX
PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

CONNIE O. HUGHES
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

CHRISTINE V. BATOR
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

Petition of Verizon New Jersey Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service in New Jersey Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order and the Triennial Review Remand Order
Docket Nos. TO05050418, TO05070606, TO05060551, & TO05060552

SERVICE LIST

Justice Daniel J. O'Hern
2 Bridge Avenue
Building 1, Floor 2
Red Bank, NJ 07701
jdohern@beckermeisel.com

James M. Corcoran
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
james.corcoran@bpu.state.nj.us

Carol A. Artale, Esq.
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
carol.artale@bpu.state.nj.us

Lawanda R. Gilbert, Esq.
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
lawanda.gilbert@bpu.state.nj.us

Christopher W. Savage, Esq.
K.C. Halm, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006-3458
chris.savage@crblaw.com
khalm@crblaw.com

Philip J. Macres, Esq.
Russell M. Blau, Esq.
Swidler Berlin LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116
pjmacres@swidlaw.com
rmblau@swidlaw.com

Sue E. Benedek, Esq.
Sprint
240 North Third Street
Suite 201
Harrisburg, PA 17101
sue.e.benedek@mail.sprint.com

Genevieve Morelli, Esq.
Brett Heather Freedson, Esq.
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, DC 20036
gmorelli@kelleydrye.com
bfreedson@kelleydrye.com

Jim Farr
Qwest Communications Corporation
250 East 2nd South
Suite 1603
Salt Lake City, UT 84111-2003
james.farr@qwest.com

James C. Meyer, Esq.
Riker Danzig Scherer Hyland Perretti LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
jmeyer@riker.com

Richard A. Chapkis, Esq.
Beth A. Sasfai, Esq.
Verizon New Jersey Inc.
540 Broad Street, Floor 20
Newark, NJ 07102
richard.chapkis@verizon.com
beth.a.sasfai@verizon.com

Kimberly Caswell, Esq.
Verizon Services Group Inc.
201 N. Franklin Street, FLTC0007
Tampa, FL 33602
kimberly.caswell@verizon.com

William K. Mosca, Jr.; Esq.
WolfBlock Brach Eichler
101 Eisenhower Parkway
Roseland, NJ 07068
wmosca@wolfblock.com

Robert C. Barber, Esq.
AT&T Corp
1120 20th St., NW
Washington, DC 20036
rcbarber@att.com

Daniel L. Pascoe, Esq.
2 Bridge Avenue
Building 1, Floor 2
Red Bank, NJ 07701
dlpascoe@beckermeisel.com

Sylvia Delvecchio
Verizon New Jersey Inc
540 Broad Street
Newark, NJ 07102
sylvia.l.del.vecchio@verizon.com

Kristi Izzo, Secretary
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Christopher J. White, Esq.
Division of the Ratepayer Advocate
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101